STATE OF NEW YORK
UNEMPLOYMENT INSURANCE APPEAL BOARD
PO Box 15126
Albany NY 12212-5126

DECISION OF THE BOARD

Mailed and Filed: APRIL 06, 2023

IN THE MATTER OF:
Appeal Board No. 612279

PRESENT: JUNE F. O'NEILL, MEMBER

In Appeal Board Nos. 612278 and 612279, the employer appeals from the decisions of the Administrative Law Judge filed August 24, 2020, insofar as they overruled the employer's objection that the claimant, and all others similar situated, were independent contractors and sustained the determination holding , liable for contributions, effective January 1, 2023, based on remuneration paid to the claimant and to all others similarly situated as employees.

The Administrative Law Judge held telephone conference hearings at which all parties were accorded a full opportunity to be heard and at which testimony was taken. There were appearances on behalf of the employer and the Commissioner of Labor.

The Board considered the arguments contained in the written statement submitted on behalf of the

employer.

Based on the record and testimony in this case, the Board makes the following

FINDINGS OF FACT: The company herein is a real estate brokerage firm that retained the services of the claimant, a licensed real estate agent, in July 2014. She completed an application and was interviewed. The company and the claimant entered into a written agreement characterizing her as an independent contractor. The company set the claimant's commission rate at 70% of all sales up to $21,000; thereafter the claimant received 100% of commissions. The

claimant was free to set her own work schedule and location and to take time off without prior approval. If she worked at the company's office, she could use the company's office equipment and conference room. She was responsible for her expenses, business cards, transportation, marketing materials, supplies and maintaining her real estate license. She was free to determine her own marketing techniques and sales methods. She was not required to attend meetings and her performance was not supervised. On occasion, she received leads. The company did not mandate training but offered training if agents so desired. She signed a document voluntarily committing to one year of Mentor Training and attending at least one team meeting per month. The document stated she could be fired if she failed to participate. No one was ever fired for voluntarily committing to training and failing to participate. The claimant was paid her commissions without deductions and issued a 1099.

OPINION: The credible evidence establishes that the company herein did not exercise sufficient supervision, direction and/or control over the claimant to establish an employer/employee relationship. It is well settled that the pertinent inquiry is whether the purported employer exercised control over the results produced or the means used to achieve those results, with control over the latter being more important (see Matter of Spielberger, 122 AD3d 998 [3d Dept 2014]; and Matter of Ted is Back Corp., 64 NY2d 725 [1984]. Incidental control over the results produced without further indicia of control over the means employed to achieve the results will not constitute substantial evidence of an employer-employee relationship (see Matter of 12 Cornelia St, 56 NY2d 895 [1982]). In Matter of Spielberger, agents were paid a commission of 60% of the brokerage fee collected, there was no established work schedule or work location, agents were not required to report to anyone, and they independently maintained their real estate license. In Matter of 12 Cornelia St., training was optional and leads were provided.

Similarly, in the case at hand the claimant was paid commission, did not have an established work schedule or location, was not required to report to anyone and maintained her real estate license, was provided optional training, paid her own expenses, was free to determine her territory, marketing strategies and sales methods, and could take time off without prior approval, and received a 1099. (See Matter of Stiefvater Real Estate, Inc., AD3d 1176 [3d Dept 2006]; Matter of Van Waes & Assoc. Realty, 76 AD2d 1016 [3d Dept 1980]). That she completed an application for employment and was interviewed are not sufficient factors of employment when balanced against the other factors of independence. Although the document for Mentor Training indicated that she

could be fired if she failed to participate, the employer credibly testified without contradiction that participation was voluntary and no one was ever discharged for failing to comply (See Matter of Jhaveri [Stacy Blackman Consulting Inc.], 127 AD3d 1391 [3d Dept 2015]). Accordingly, we conclude that the claimant rendered services as an independent contractor and not as an employee.

The issue of whether the claimant's services should be excluded under Labor Law § 511.19 need not be decided.

DECISION: The decisions of the Administrative Law Judge, insofar as appealed from, are reversed.

The employer's objection, that the claimant, and all others similar situated, were independent contractors, is sustained.

The determination, holding , liable for contributions,
effective January 1, 2023, based on remuneration paid to the claimant and to all other similarly situated as employees, is overruled.

The claimant is denied benefits with respect to the issues decided herein.

JUNE F. O'NEILL, MEMBER